Supreme Court, U. S.
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No. 78-576

In the Supreme Court of the United States

OCTOBER TERM, 1978

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

WINN-DIXIE STORES, INC. and NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Washington, D.C. 20570

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The petition for a writ of certiorari was not timely filed. The judgment of the court of appeals was entered on July 5, 1978 (App., *infra,* 6a). Under 28 U.S.C. 2101(c), the petition for a writ of certiorari was due to be filed within 90 days after the entry of judgment, *i.e.,* by October 3, 1978. The petition was not filed, however, until October 6, 1978 (a Friday). On October 3, 1978, Mr. Justice Powell denied petitioner's application for an extension of time within which to file a petition for a writ of certiorari. The time limit specified by 28 U.S.C. 2101(c) is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 417-418 (1923).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JOHN S. IRVING
General Counsel
National Labor Relations Board

NOVEMBER 1978

DOJ-1978-11

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2733

WINN-DIXIE STORES, INC.,

Petitioner-
Cross Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent-
Cross Petitioner.

No. 76-3558

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

JUDGMENT

Before: WISDOM and GEE, Circuit Judges, and VAN PELT*, District Judge.

THIS CAUSE came on to be heard upon the petitions of Winn-Dixie Stores, Inc., and Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-

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*Senior District Judge of the District of Nebraska sitting by designation.

CIO, to review an order of the National Labor Relations Board issued on June 21, 1976, against petitioner in No. 76-2733, and upon a cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on November 15, 1977, and has considered the briefs and transcript of record filed in this cause. On February 17, 1978, the Court, being fully advised in the premises issued its decision granting in part and denying in part enforcement of the Board's said order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Winn-Dixie Stores, Inc., Jacksonville, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promulgating, maintaining, and enforcing an unlawful, broad no-solicitation rule which precludes employees from engaging in union activity on nonworking time.

(b) Promulgating, maintaining, and enforcing an unlawful, broad no-distribution rule which precludes employees from engaging in union activity in nonworking areas on nonworking time.

(c) Announcing increased insurance benefits so as to influence employees to refrain from designating a bargaining representative.

(d) Making substantial gifts, in the form of free dinners and door prizes, to induce employees to refrain from designating a bargaining representative.

(e) Instructing employees to stop engaging in union activity.

(f) Promulgating and maintaining an exclusionary clause which disqualifies or excludes from participation in its pension profit-sharing plan employees covered by a pension plan resulting from collective bargaining through a labor organization.

(g) Refusing to bargain collectively with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter called the Union), in the unit described below by adamantly insisting on and refusing to discuss with the Union exclusion of unit employees from participation in Petitioner's pension/profit-sharing plan upon being covered by another pension plan resulting from collective bargaining.

The appropriate unit is:

All employees engaged in the receiving, shipping, and processing of all food and sundry products at the Employer's warehouse at Jacksonville, Florida, excluding all employees in the meat and cheese processing and packaging department, all garage and mechanical maintenance employees, carpenters, regular maintenance personnel, truckdrivers, and helpers, office clerical employees, guards, and supervisors as defined in the Act.

(h) Refusing to bargain collectively with the Union by, unilaterally, and without notice or prior consultation, granting a wage increase or increased insurance benefits to employees in the above-described unit.

(i) Refusing to bargain in good faith by refusing to permit the Union to conduct inplant job studies through an independent engineer designated by the Union, and by denying union representatives access, free of any unreasonable conditions, to the

warehouse for investigation of safety and sanitary conditions, and the extent to which supervisors perform unit work.

(j) Making any changes in its pension/profit-sharing plan that will affect the rights of unit employees without first notifying the Union, and, upon its request, bargaining with it over such changes.

(k) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively and in good faith with the Union, as the exclusive representative of all the employees in the unit described above, cocerning unit employees' participation in its pension/profit-sharing plan; changes in employees' insurance plans and benefits; employees' wage increases; and the right of engineers and representatives designated by the Union to access, free of any unreasonable conditions, to the warehouse for time and job studies, investigation of safety and sanitary conditions, and the extent to' which supervisors perform unit work. Petitioner shall also bargain as to wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at all its locations within the Jacksonville division copies of the attached notice marked "Appendix." Copies of said notice, on forms

provided by the Regional Director for Region 12 of the National Labor Relations Board (Tampa, Florida), after being duly signed by Petitioner's authorized representative, shall be posted by Petitioner immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

(c) Mail a signed copy of said notice marked "Appendix" to each employee in the appropriate unit at the Jacksonville warehouse immediately upon receipt thereof from the Regional Director for Region 12.

(d) Convene during working time, by departments or shifts, all employees in said appropriate collective-bargaining unit at which a responsible official of the Petitioner, namely, a department head or higher level official, shall read to said employees the contents of the attached notice marked "Appendix."

(e) Upon request of the Union, made within 1 month after issuance of a final judgment in this proceeding, immediately grant the Union and its representatives reasonable access, for a period of 1 year, to the bulletin boards at the Jacksonville warehouse and all places where notices to employees are customarily posted at said location.

(f) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Petitioner has taken to comply herewith.

All parties are to bear their own costs, except that the cost of printing the appendix shall be borne equally by each of the three parties before the Court.

ENTERED: March 13, 1978

ISSUED AS MANDATE: July 5 1978

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Kim B. Davis
Deputy
New Orleans, Louisiana

JULY 5, 1978

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF
THE UNITED STATES COURT OF APPEALS
ENFORCING AN ORDER, AS MODIFIED, OF
THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing at which both sides had an opportunity to present evidence, the National Labor Relations Board has found we have violated the National Labor Relations Act and we have been ordered to post this notice.

The Act gives the employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choosing
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any such activities.

WE WILL NOT announce, maintain, or enforce rules prohibiting you from soliciting for the Union on your own time, nor will we announce, maintain, or enforce rules prohibiting you from distributing union literature in nonworking areas on your nonworking time.

WE WILL NOT announce or grant benefits in any form to influence your right as employees to decide whether or not you wish to be represented by Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

WE WILL NOT order you to stop engaging in activity in support of Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

WE WILL NOT refuse to bargain collectively with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, in the unit described below by adamantly insisting on and refusing to discuss with the said labor organization exclusion of unit employees from participation in our pension/profit-sharing plan upon being covered by another pension plan resulting from collective bargaining. The appropriate unit is:

All employees engaged in the receiving, shipping, and processing of all food and sundry products at the Employer's warehouse at Jacksonville, Florida; excluding all employees in the meat and cheese processing and packaging department, all garage and mechanical maintenance employees, carpenters, regular maintenance personnel, truckdrivers, and helpers, office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with the above-named labor organization in the appropriate unit by unilaterally, and without notice or prior consultation, granting a wage increase or increased insurance benefits to our employees in the appropriate unit.

WE WILL NOT refuse to bargain in good faith by refusing to permit the Union to conduct inplant job studies through an independent engineer designated by the Union, and by denying union representatives investigation of safety and sanitary conditions, and the extent to which supervisors perform unit work.

WE WILL NOT make any changes in our pension/profit-sharing plan that will affect the rights of unit employees without first notifying the above-named labor organization, and, upon its request, bargaining with it over such changes.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL, upon request, bargain collectively and in good faith with the above-named labor organization, as the exclusive representative of all the employees in the unit described above, concerning unit employees' participation in our pension/profit-sharing plan; changes in insurance plans and benefits; wage increases; the right of engineers and representatives designated by the Union to access, free of any unreasonable conditions, to the warehouse for time and job studies, investigation of safety and sanitary conditions, and the extent to which supervisors perform unit work; as well as wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WINN-DIXIE STORES, INC

_____

(Employer)

Dated _____

By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 706, Federal Office Building, 500 Zack Street, P.O. Box 3322, Tampa, Florida 33602, Telephone 813-228-2662.